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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1395

JERAL BLISS NICKERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on March 20, 1968.

CITATIONS TO OPINIONS BELOW

The judgment and commitment of the District Court is unreported and is printed in Appendix A hereto, *infra.*, p. A1. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra.*, p. A5 , is unreported to this date.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 20, 1968, and is set out in Appendix A, p. A5, infra. On April 19, 1968, Mr. Justice White extended the time within which to file this petition for certiorari to and including May 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court erred in not dismissing the action against the Defendant herein and entering a judgment of acquittal on the ground that the Defendant had been denied the assistance of counsel under the VI Amendment of United States Constitution, by reason of having been denied the assistance of counsel at a critical stage in his criminal prosecution.

STATEMENT

The Petitioner was born May 3, 1942, and registered for the draft on July 14, 1960, with Local Board No. 37, Leavenworth, Kansas. On November 25, 1960, the Petitioner was mailed his classification questionnaire which was returned by him on December 15, 1960. On the basis of the classification infomation, Petitioner was classified as 1-A, and notified by SS Form 110 on January 10, 1961. On January 20, 1961, Petitioner requested a personal appearance before the Board, was granted the same, and did meet with said Local Board on March 14, 1961. On May 9, 1961, he was classified as 3-A by virtue of the family he had at the time. On July 12, 1961, he was reclassified 1-A because of change in marital status. He was ordered to report for physical examination on November 12, 1963, but failed to so report. The Board then ordered him to report for induction on December 13, 1963, and after correspon-

dence between the Petitioner and the Board, this order was cancelled and an order was issued for him to report on January 20, 1964, for a physical examination. Before that date, Petitioner filed a special form requesting classification as a conscientious objector and then failed to report for physical examination. Proceedings before the Board were thereafter stayed pending consideration of the claim to conscientious objector classification. After investigation this was rejected on September 28, 1965, and Petitioner was again classified 1-A. During the time between January 20, 1964 and September 28, 1965, the proceedings were stayed for determination as to whether or not Petitioner could be classified as a conscientious objector (1-O). After investigation by the Federal Bureau of Investigation and ruling by the Appeal Board this Petitioner was classified 1-A as noted above. It is interesting to note that after the investigation and the resulting meeting with T. Oscar Smith, Chief of the Conscientious Objector Section, he made the observation in a letter which was placed in the record by the prosecution that read in part, "The resume contained the worst report he had ever read on any registrant, and that the Defendant probably be of no service to the United States Government." This apparently was not taken into consideration by the Local Selective Service Board, and on October 11, 1965, Petitioner was, for the third time, ordered to report for Armed Forces Physical examination on October 18, 1965 at 5:15 A.M. (Sharp). He once again failed to report for physical examination. On October 27, 1965, Petitioner's Local Board ordered him to report for induction on November 8, 1965, and on November 4, 1965, the induction date was postponed pending consideration of Petitioner's case. On December 13, 1965, the Director of State Selective Service directed the Local Board Clerk to withdraw the postponement and advice Petitioner by letter to report to the Local Board on December 20, 1965 for forwarding to the Armed Forces Induction Center. The

Petitioner did not report to the Local Board. This also apparently was not taken into consideration by the Trial Court and apparently there should have been a determination that the Petitioner was not a proper person for proposed induction into the Armed Services at this or any other time, unless there was a drastic change in his moral standards.

The Petitioner was charged by indictment of violating Section 462, Title 50 App. U.S.C. in refusing to submit to an order of induction into the Armed Forces of the United States. The Honorable Trial Judge appointed Mr. Donald L. Deam, attorney at law, Topeka, Kansas, as defense counsel. Upon the advice of Mr. Deam, the Petitioner waived a trial by jury and the matter went to a trial before the Honorable Trial Court, with the Petitioner's only defense to the charge at the time of trial being that the order of induction was invalid based upon the fact that he was improperly classified by his Local Draft because of his claim of being a conscientious objector, and on December 14, 1966, said trial court found that the Petitioner had been convicted upon his plea of not guilty, and a verdict of guilty was returned by the court.[1] The Trial Court further found that the Petitioner was 24 years of age at the time of conviction and was suitable for handling as a Young Adult Offender (18 U.S.C. 4209) and committed the Petitioner to the custody of the Attorney General or his authorized representative as a Young Adult Offender for observation and study pursuant to 18 U.S.C. 5010 (e), the results of such study to be reported to the Trial Court by the Youth Correction Division of the United States Board of Parole within 60 days, or such additional period as the Trial Court might grant, at which time the Petitioner was to be returned to the Trial Court for imposition of such sentence as the Trial Court might find to be appropriate. Because of the appellate proceedings which have been carried out since that time, such observation, study and report

[1] Appendix A, *infra*.

has not been made and therefore the Petitioner has not yet been sentenced.

On July 22, 1964, a charge of felony of non-support of his minor child, Randall Scott Nickerson, was filed in the District Court of Comanche County, Kansas, and the matter was still pending on June 19, 1967.

At all time after the registration of the Petitioner and up to the present date, there was and is an Armed Forces Regulation under the Selective Service Act, namely AR 601-270-23, Moral Standards, d., Criminal Charges Filed and Pending, which states: "Men who have criminal charges filed against them alleging a violation of a State, Federal, or Territorial Statute are unacceptable.".

At no time from July 14, 1960, until the employment of defense counsel for trial by the Trial Court did the Petitioner ever receive notification by any member of the Selective Service System or any member of the Justice Department (who were involved in the matter for some months) that he had the "right of assistance of counsel" and that the deprivation of the assistance of counsel was a violation of the VI Amendment of the United States Constitution. The assistance of such counsel or the knowledge of the availability of such counsel was never made known to him in aiding in the decisions as to the advisability of taking an appeal from the order of his Local Draft Board, rejecting his claim to an exemption from both combatant and non-combatant military training in the service in the Armed Forces, or the advisability of reporting for induction as ordered and raising the issue of the fact of the State felony charge which was pending against him at that time.

The Petitioner effected an appeal to the United States Court of Appeals for the Tenth Circuit. The verdict and judg-

ment of the Trial Court was affirmed.[2] The Circuit Court felt that the Petitioner had been given an opportunity to present an adequate defense and that his constitutional rights under the VI Amendment had not been violated.

The appeal to the Circuit Court was unusual in that the basis for the appeal was not based upon the grounds that it could be shown that the Petitioner was a conscientious objector, but rather upon other constitutional grounds which the Petitioner and the present counsel for the Petitioner felt, and now feel, are of much more serious nature and substance.

REASONS FOR GRANTING THE WRIT

I.

The deprivation of an attorney and/or the stating to the Petitioner of his right to an attorney in his appearances before the Selective Service Board and the Justice Department was an unconstitutional deprivation under the VI Amendment of the Constitution of the United States and resulted in a denial of the Petitioner's constitutional rights as guaranteed by the said VI Amendment of the Constitution of the United States, and the Local Draft Board and/or the Honorable Trial Court should have taken into consideration the report of T. Oscar Smith, and not classified the Petitioner as 1-A, and convicted the Petitioner of failing to report for induction since for the benefit of the United States Government he should not have been classified 1-A and ordered to report.

The petitioner stands convicted as a felon without ever having been afforded or having waived the assistance of counsel in making a legitimate defense to the crime for which he

[2] Appendix A, *infra*.

was charged at a critical stage in his criminal prosecution, namely, at the time of classification and investigation and at the time of the order for induction. He was charged by indictment with violating Sec. 462, Title 50 App. U.S.C. The substance of the charge was that Mr. Nickerson had willfully refused to submit to an order of induction into the Armed Forces of the United States. The Petitioner's only defense to this charge at the time of trial was that the order of induction was invalid based upon the fact that he was improperly classified by his Local Draft Board because of his claim of being a conscientious objector.

The entire defense before the Honorable Trial Court was upon this basis, and never once until the hearing set for sentencing held on December 4, 1966, was there any reference in the official Court Record to any other possible defenses.

During the time from February 13, 1964 to August 15, 1965, the Petitioner's cover sheet (official file) was in the custody of the Justice Department, pursuant to the provisions of Sec. 1626.25, Selective Service Regulations, special provisions when appeal involves claim that registrant is a conscientious objector. That during this period of time, an investigation instigated by and carried on by the Justice Department, while uncovering a multiplicity of facts detrimental to the character and morals of the Petitioner, never did, at any time, discover that the Petitioner had been charged with a felony of non-support of his minor child, Randall Scott Nickerson, filed on July 22, 1964; nor did any individual or official associated with the Selective Service System apparently have knowledge that he had been charged with such felony; and that, as a matter of fact, the Petitioner had been charged with such a felony by an information which was filed in the District of Comanche County, Kansas, on July 22, 1964, and that the matter was still pending on June 19, 1967. Also the Selective Service

System and the Honorable Trial Court did not take into consideration the Petitioner's unfitness for service in the Armed Forces as quoted by T. Oscar Smith, *supra.*

Petitioner was never notified by any member of the Selective Service System, nor by any member of the Justice Department, who, by this time, were involved in the matter, that he had the "right of assistance of counsel and that the deprivation of the assistance of counsel was a violation of the VI Amendment of the United States Constitution for the purpose of taking an appeal from the order of his Local Draft Board, rejecting his claim to an exemption from both combatant and noncombatant military training in the service in the Armed Forces or the taking of any other appropriate action. Nor did the Petitioner report as ordered and make known to the officials in charge of the pending state felony and even during the trial of this case, this matter was not brought forth until after the Court had made a finding of guilty and was determining what should be done about sentencing. Obviously no action was taken by the Petitioner because of lack of knowledge on his part of his rights, and because he was not advised of his rights by counsel or anyone concerned with the problem, including the Selective Service System or the Justice Department of the United States Government. That Petitioner is and has been aware of the decision of the Honorable Circuit Court for the Tenth Circuit in the case of the UNITED STATES vs. CAPSON, 347 F. 2d 959 and that case was relied upon by the Honorable Circuit Court in its decision upon this case, *infra.* when it stated on Page 5 of that decision "It was specifically considered and decided by this Court in UNITED STATES vs. CAPSON 10 Cir., 347 F. 2d 959, that a registrant is not entitled to the assistance of counsel under the VI Amendment for his appearances before the Selective Service Boards for classification. There have been no Supreme Court decisions on this question since

our decision in Capson and Appellant presents no new arguments to suggest that this decision should be reversed. Therefore, we must hold that Appellant was not unconstitutionally deprived of counsel at any stage of the proceedings before the Board." Petitioner believes and prays this Honorable Supreme Court to grant certiorari in this particular case for this very reason. The Honorable Court of Appeals disagreed with Appellee's position in that case on the basis that the Board's classification was in no way penal, and, secondly, for the reason that a prosecution for violation of the Board's order was far from hollow though they did admit "even though we readily concede the judicial review is narrowly limited and the accused's possible defenses are few." The Court further stated in that particular case that since the entire record had been brought up and the disputed point briefed and argued, opposing counsel had been fully apprised of the Government's contentions in that case and therefore the disputed point was properly before them. The Honorable Court of Appeals further held in the case at hand that the Petitioner was not entitled to an absolute exemption simply because he had a felony charge pending against him. Yet it did state on Page 7 *infra.*, "In all probability had the Local Board known of the pending felony against Appellant it would have delayed his classification until such time as the charges were resolved. However, it is clear that the burden rests upon the registrant to present information concerning his classification to the Board and having failed to do so he may not now validly claim that his classification of 1-A was illegal."

The said Honorable Court also draws the distinction of the faet that a Local Selective Service Board is a part of the executive branch of our government and is not controlled by Army Regulations, but states that it is true that the Board works in conjunction with the Armed Forces for the selection and induction of men into the Armed Forces and therefore the

Army Regulations could not be applicable until the inductee passed into the control of the Armed Forces. The Court further states *infra.*, Page 9, "Had appellant appeared as ordered for any of his physical examinations, the existence of the pending felony charge probably would have been discovered by the examining authorities and he could have been declared unacceptable for induction. Appellant, however, did not appear as ordered for the examinations." It is for this very reason that we believe that the Capson case should be reviewed and that the decision should be reversed by the Honorable Supreme Court and that such Court should hold that the time of classification and the order to appeal and appear before the Local Induction Board should be considered "the critical stage" in induction proceedings. Had the Petitioner been apprised of the rules and regulations by counsel at this "critical stage", no doubt his action would have been completely different than that taken and he would not now stand convicted as a felon.

Under the recent decisions of the Honorable Supreme Court of the United States, he was entitled to the assistance of counsel at the time he was in the process of an administrative proceedings which led to his re-classification as 1-A and his subsequent order to appear, and failure to comply with that order, which led to the present felony of which he now stands tried and convicted. HAMILTON vs. ALABAMA, 368 U.S. 53 (1961) p. 55; WRIGHT vs. MARYLAND, 373 U.S. 59 (1962); ESCOBEDO vs. ILLINOIS, 378 U.S. 478 (1964); MIRANDA vs. ARIZONA, 34 Law Week 4521 (1966) These thoroughly extend the assistance of counsel to a defendant at any stage of a criminal proceeding in which the defendant has or might have a defense. In HAMILTON vs. ALABAMA, *supra,* the Honorable Supreme Court held that arraignment under Alabama Law was a critical stage of a criminal proceeding. The Court said in that case, with regard to the time of arraignment, "Only the presence of counsel could have enabled this accused to know

all of the defenses available to him and to plead intelligently." (Ibid, at p. 55) Referring back to the Hamilton case, it goes further in that case to state, "The question of jurisdiction of the Local Board is breached only if there is no basis in fact for the classification which it gave its registrant." p. 123. Again, the Petitioner states that this is all the more reason why there is a need for proper legal representation and advice during the time of the "critical stage" which took place at the time of the classification and appearances before the Selective Service Board and Justice Department, and the subsequent order to appear before induction into the Armed Forces.

Certainly the record in this case shows that the stage at which certain action or lack of action is at the time of the administrative hearings, this is therefore proof that this is a "critical stage" in this Petitioner's case.

This case varies from the Capson case, ***supra,*** in that in this case there was an appeal which was not carried to the full extent, but under which there were certain investigative proceedings which brought out every known fact to and about the Petitioner, except the one most important for him to know. Again, this shows that the Petitioner must have the benefit of counsel at this "critical stage" of his proceedings or his rights are waived. The Petitioner believes that not just the Petitioner's procedure is the "critical stage" but rather the entire administrative procedure is such a stage. All that is necessary for it to be critical under the Hamilton decision is that the stage is one in which decisions must be arrived at which make a substantial difference to the defense of the criminal prosecution.

The Supreme Court has clearly held that the right of counsel provision of the VI Amendment to the United States Constitution applies to administrative procedures, if the practical

consequence of those procedures warrant the application of the Amendment. KENNEDY vs. MENDOZA-MARTINEZ, 372 U. S. 144 (1963). In KENNEDY vs. MENDOZA-MARTINEZ, the Supreme Court held that the administrative procedures adopted by Congress resulting in the loss of citizenship were unconstitutional on the ground that they resulted in penal sanctions without the assistance of counsel required by the VI Amendment if a defendant may lose his defense to a criminal prosecution during a particular procedure, if not properly advised, it does not matter where or when the procedure occurs or whether it occurred before or after indictment. If such a defendant is to have the assistance of counsel as guaranteed by the VI Amendment, then certainly he must have counsel at the time it was necessary to preserve or waive his defense.

It has often been argued that on considerations of National Security, such an application of the VI Amendment as presented in this Motion would be a serious detriment or destroy the Selective Service Act. However, recently the Supreme Court rejected the necessity of adequate law enforcement as a reason for constricting the scope of the VI Amendment in the context of police interrogation. In ESCOBEDO vs. ILLINOIS, *supra.*, the Supreme Court said: "We have also learned the companion lesson of history that no system of criminal justice can or should survive if it came to depend for its continued effectiveness on the citizens abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer he will become aware of and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

The Supreme Court has also unequivocally rejected the argument that the great powers of Congress to conduct war

and to regulate foreign relations should be the basis of limiting the constitutional guarantees of the VI Amendment. In KENNEDY vs. MENDOZA-MARTINEZ, *supra.,* the Supreme Court recently held: "It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the greatest emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crises, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action." pp. 164-165.

The Petitioner again quotes HAMILTON vs. ALABAMA, *supra.,* p. 55, "That we do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled this accused know all the defenses available to him and to plead intelligently'." In the case of POWELL vs. ALABAMA, 287 U.S. 45, the Court stated: "The guiding hand of counsel was essential to advise Petitioner of his rights in this delicate situation." p. 69. In the case of MIRANDA vs. ARIZONA, *supra.,* (taken out of context), "The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement." And, "The accused who does not know his rights and therefore, does not make a request may be the person who most need counsel." p. 4531. The Supreme Court has, in KENNEDY vs. MENDOZA-MARTINES, *supra.,* clearly held that the right of counsel provision of the VI Amendment of the United States Constitution applies to administrative procedures, if the fact of consequence of those procedures warrant application of the Amendment.

The foregoing clearly shows that under the present rules with regard to the defense of improper classification, the Peti-

tioner has been deprived of his constitutional right to the assistance of counsel at a "critical stage" in his criminal prosecution, and the judgment of the Court of Appeals and District Court should, therefore, be reversed and the cause remanded with instructions to dismiss the indictment.

II.

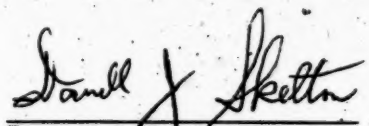
An interpretive decision by this Court on a defendant's right to representation during the administrative procedures leading up to the order for induction is needed.

It is respectfully submitted that this Court has not recently had the opportunity to make a decision based upon facts similar to the facts in the case at Bar. This Court has, in recent years, done much to insure the rights of defendants to the assistance of competent counsel for the presentation of their defenses, and it is likewise imperative that these same defendants have the opportunity of having the assistance of competent counsel during the administrative procedures if such procedures are the "critical stage", that lead up to their criminal indictments. The Circuit Court of Appeals for the Tenth Circuit did not give serious consideration to the deprivation of Petitioner's constitutional rights during administrative procedures because of its decision in the Capson case and the Petitioner believes that, based upon the facts as presented in this case, it is important that the Capson decision be reviewed by this Honorable Court.

CONCLUSION

For the foregoing reasons, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,



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